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77-713

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-5031

BARRY WILLIAM WEST,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioner, Barry William West, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on September 9, 1977, convicting[1] him of violating 18 U.S.C. § 659, and that upon hearing, the judgment of conviction be reversed.

[1] An extraordinary aspect of the case is that the Court of Appeals did not, technically speaking, affirm the Defendant's conviction, but rather convicted him, as an original matter, of a crime with which he had not been charged in the District Court.

OPINIONS BELOW

The opinions of the Court of Appeals convicting the Defendant and denying the Defendant's petition for a rehearing with a suggestion of rehearing en banc, are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1977. Timely petition for rehearing with suggestion for rehearing en banc was filed, and was denied on October 6, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Defendant was deprived of his Fifth Amendment right to be "held to answer only on a presentment or indictment by a Grand Jury" when

(a) He was convicted under an indictment which charged, in the language of the statute, that he had "received stolen firearms that were then moving in interstate commerce, knowing them to have been stolen," in violation of 18 U.S.C. § 922(j);

(b) The Court of Appeals held that he was improperly convicted of violating § 922(j), because it was undisputed that the firearms were not stolen when they moved in interstate commerce, but

(c) The Court of Appeals amended the charges against the Defendant, without prior notice or benefit of Grand Jury consideration, and entered a judgment convicting him of violating the factually different provisions of 18 U.S.C. § 659, which

prohibit theft of property from interstate terminals or carriers, and the knowing receipt of property which has been so stolen.

2. Whether a Defendant can be convicted of receiving and concealing stolen property on the basis of proof that he, himself, stole the property.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . .."

18 U.S.C. § 922(j)

"It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, or which constitutes interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen."

18 U.S.C. § 659

"Interstate or foreign shipments by carrier; state prosecutions."

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motor truck, or other vehicle, or from any tank or storage facility, station, stationhouse, platform or depot, or from any steamboat, vessel, or wharf or from any

aircraft, air terminal, airport, aircraft terminal or air navigation facility, with the intent to convert to his own use, any goods or chattel moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or

Whoever buys or receives or has in his possession any such goods or chattel, knowing the same to have been embezzled or stolen;

. . . . . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year or both.

STATEMENT OF THE CASE

The Defendant was convicted in the District Court for the Middle District of Tennessee of violating 18 U.S.C. § 922(j), which makes it a felony to receive stolen firearms which are moving in interstate commerce. The indictment charged the Defendant in the language of the statute, asserting that he "did receive, conceal and store stolen firearms . . . which were then moving as and constituted interstate commerce". The stipulated facts showed that the Defendant stole two pistols from a shipping box after they had been legitimately shipped from Georgia to Tennessee, and that there was no further interstate shipment of the pistols after they were stolen. The issue presented to the District Court was whether the Defendant could be convicted of violating 18 U.S.C. § 922(j) when the proof showed that the pistols were not stolen property at the time they moved in interstate commerce. The District Court found the Defendant guilty in an opinion that did not address this issue.

On appeal, the Sixth Circuit Court of Appeals held that the Defendant had been improperly convicted under 18 U.S.C. § 922(j), because the pistols were not stolen until after they had moved in interstate commerce. The Court held, however, that the proof would have sustained a conviction under 18 U.S.C. § 659, since the Defendant had either stolen property from an interstate facility or carrier, or had received property which had been so stolen. The Court held that, since the proof would have sustained a conviction under § 659, he could properly be convicted of having violated that Section, even though a violation of that Section had not been charged in the indictment. The Court treated the case as one involving the miscitation of a statutory section, and held that the indictment's reference to § 922(j) instead of § 659 constituted harmless error. The Court further held that the Defendant could properly be convicted of having received and concealed the firearms, even though the proof showed that he himself had stolen them.

The Defendant filed a petition for rehearing, with suggestion for rehearing en banc, asserting: (1) That the indictment not only referred to § 922(j), but quoted the factual provisions of that section almost verbatim; (2) That the factual provisions of § 659 were not charged in the indictment, in that there was no reference to any theft from an interstate facility or carrier; and that, therefore (3) The Court of Appeals had convicted the Defendant of an offense with which he had not substantively been charged, in violation of his Fifth Amendment right to be put to trial only upon presentment or indictment of a Grand Jury. The Defendant's petition further asserted that the Court's decision was contrary to the holding of the United States Supreme Court in *Milanovich v. United States*, 365 U.S. 551 (1961), in which the Court held that a defendant could not be convicted of receiving and concealing property, on the basis of proof that he himself had stolen the property.

The petition for rehearing was denied and the suggestion for en banc rehearing was rejected.

We seek review and reversal of the Defendant's conviction.

REASONS FOR GRANTING THE WRIT

I

Violation of Fifth Amendment Rights.

The Court of Appeals, in essence, amended the indictment against the Defendant at the Appellate level, striking the allegation that he received "stolen firearms that were then moving in interstate commerce", and substituting the allegation that he stole property from an interstate terminal or carrier, or received property that had been so stolen. A clearer violation of fundamental procedural rights can hardly be imagined. A Grand Jury had charged the Defendant with trafficing in the interstate shipment of stolen firearms. Believing that the charge would have to be proved as alleged, and knowing that it could not be proved, the Defendant entered a plea of not guilty, waived jury trial, and stipulated all of the facts. The District Court erroneously found him guilty of the charge, disregarding the stipulated proof that the firearms were not stolen at the time they moved in interstate commerce. The Court of Appeals agreed that this was error, but committed a far graver error by holding that the factual allegations of the indictment need not be proven, and convicting the Defendant of a different charge, that was never considered, and certainly never alleged by the Grand Jury. In principle this procedure would have permitted the Defendant's conviction of burglary, jay-walking, or murder if facts to support it had appeared in the proof, and if Federal statutes could have been found to cover it. The simple truth is that the Defendant was indicted for one offense and convicted at the *appellate level*, of a wholly different offense. He was deprived not only of the benefit of Grand Jury consideration, but of basic notice of the offense with which he was charged.

The Court of Appeals' decision is contrary to holdings of the United States Supreme Court in *Stirone v. United States*, 361 U.S. 212 (1960) and *Ex Parte Bain*, 121 U.S. 1 (1887). In both of these cases the Supreme Court held that significant amendments in the factual allegations of indictments after their return deprive defendants of their Fifth Amendment rights. These cases involved less egregious violations than the present case, since the amendments of the indictments were less fundamental, and since they occurred at the trial level, so that the defendant had at least some notice of the charges he would have to meet. In *Stirone* the indictment alleged that the Defendant had unlawfully obstructed interstate commerce, consisting of shipments of ready-made concrete, and the Government was permitted to prove that the defendant's conduct had also interfered with interstate steel shipments. The Court held that this de facto amendment of the indictment was in derogation of the Grand Jury's function and contrary to the Fifth Amendment:

> "If it lies within the province of a court to change the charging part of an indictment to suits its own notions of what it ought to have been, or what the Grand Jury would probably have made it if their attention had been called to suggest a change, the great importance which the common law attaches to an indictment of a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed. . . . Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." 361 U.S. at 216, 217.

The Sixth Circuit asserted harmless error in the present case, attempting to rely upon cases involving miscitation of statutory numbers. This was not, however, a case in which the wrong

statutory section was cited in the indictment. The indictment not only referred to 18 U.S.C. § 922(j), but quoted the factual provisions of that section almost verbatim. Since the Court held that the proof would not sustain a conviction under § 922 (j), logic compelled the conclusion that it would not sustain a conviction under an indictment quoting the language of that section. Far from constituting harmless error, the prosecutorial actions taken in this case, and the judicial reasoning produced by the Court's efforts to justify them, have given rise to dangerous and potentially far-reaching procedural precedents.

II

Conviction of "Receiving" on the Basis of Proof of Theft.

It is not entirely clear whether the Defendant was ultimately convicted of stealing goods from an interstate terminal or carrier, or of receiving goods that had been so stolen. If the former, the allegations of the indictment were even more inappropriate than previously indicated, since they charged him with "receiving" rather than "stealing". If, on the other hand, the Court of Appeals intended to convict the Defendant of "receiving", his conviction is contrary to the holding in *Milanovich v. United States*, 365 U.S. 551 (1961).

In the *Milanovich* case the Supreme Court held that a defendant could not be convicted of both stealing, and of receiving and concealing, Government funds in violation of 18 U.S.C. § 641. The Court held that Congress intended to make a statutory distinction between thieves and receivers from thieves —that "with respect to the receiving statute . . . Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the . . . robbers themselves." 365 U.S. at 554, quoting *Heflin v. United States*, 358 U.S. 415, 420. Applying this reasoning to the case at bar, it seemed clear that the defendant could not properly be convicted under an indictment

charging him as a receiver on the basis of proof that he was a thief.

The Court of Appeals held, however, that while *Milanovich* prohibited conviction of a thief for both theft and receiving, it did not prohibit conviction of a thief for receiving alone. We submit that, on the contrary, *Milanovich* clearly holds that receiving statutes are not intended to punish theft at all, but are intended only to punish those who receive goods already stolen. The language of the opinion is plain: "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the robbers themselves."

The entire focus of the *Milanovich* opinion is upon defining the word "receive" as used in Federal Criminal Statutes, and not with providing the Government with an election of criminal remedies in cases involving the theft of property. Had the Court been concerned merely with the problem of multiple punishments for single criminal transactions, it could merely have applied the holding of *Bell v. United States*, 349 U.S. 81 (1954), which prohibits separate punishment of distinct crimes arising out of a single criminal transaction. It chose instead to hold that stealing and receiving are inherently distinguishable offenses, involving different classes of wrongdoers, and that proof of one does not constitute proof of the other. The Sixth Circuit's misapplication of this important Supreme Court decision is a second reason justifying Supreme Court review of the Defendant's conviction in this case.

Respectfully submitted,

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APPENDIX

United States District Court for the
Middle District of Tennessee
Nashville Division

United States of America

v.

Barry William West

No 76-174-NA-CR

MEMORANDUM

(Oct. 7, 1976)

The defendant was charged by indictment as follows:

> "On or about January 2, 1976, in the Middle District of Tennessee, BARRY WILLIAM WEST knowingly did receive, conceal and store stolen firearms, that is, a Smith and Wesson .38 caliber revolver, Model 60, Serial No. R89979 and a Browning pistol, .380 caliber, Serial No. 70N01435, which were then moving as and were a part of and constituted interstate commerce from Rossville, Georgia, to Santa Fe, Tennessee, knowing and having reasonable cause to believe that the firearms were stolen.
>
> "In violation of Title 18, United States Code, Section 922(j)."

The cited statute provides in pertinent part that,

> "It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm . . . which is moving as, which is a part of, or which constitutes, interstate . . . commerce, knowingly or having reasonable cause to believe that the firearm . . . was stolen."

Defendant entered a plea of not guilty.

The facts are not disputed and are in major part stipulated.

Certain firearms, including those described in the indictment, were being shipped from Georgia via United Parcel Service to Santa Fe, Tennessee. In Nashville, Tennessee, the defendant opened one of the cartons in the shipment, extracted two firearms, retaped the carton, and placed it back in the course of commerce. The two extracted firearms were carried by the defendant to his home and placed in a closet.

The defense asserted is that the indictment charges the defendant with *receiving* stolen firearms, and that a thief "steals" but does not "receive." However, assuming arguendo this contention to be true, it is beyond dispute that a thief can *conceal* and *store* stolen firearms. Since the indictment charges defendant with concealing and storing, it is sufficient.

The law is well settled that where a statute specifies several alternative ways in which an offense may be committed, the indictment may allege the several ways in the conjunctive, and this fact neither renders the indictment bad for duplicity nor precludes a conviction if only one or two of the several allegations linked in the conjunctive in the indictment are proven. *Crain v. United States*, 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896); *Driscoll v. United States*, 356 F.2d 324 (1st Cir. 1966); *United States v. Conti*, 361 F.2d 153 (2nd Cir. 1966); *United States v. McCann*, 465 F.2d 147 (5th Cir. 1972); *United States v. Amick*, 439 F.2d 351 (7th Cir. 1971); *Gerberding v. United States*, 471 F.2d 55 (8th Cir. 1973); *United States v. Jones*, 491 F.2d 1382 (9th Cir. 1974); *Bayless v. United States*, 365 F.2d 694 (10th Cir. 1966); *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971).

Thus, since the evidence was sufficient to show that defendant did conceal and store the firearms in question, that said firearms were moving as interstate commerce, and that the defendant

committed the proscribed acts with knowledge that the firearms were stolen (he being the thief) and with culpable intent to conceal and store said firearms, a determination of his guilt cannot be challenged merely because the Government failed to establish that defendant "received" the firearms as charged in the indictment.

The defendant is found guilty of the offense charged. An order will be entered incorporating this memorandum by reference and setting a date for sentencing.

/s/ L. CLURE MORTON
United States District Judge

No. 77-5031

United States Court of Appeals for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Barry William West,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Tennessee.

Decided and Filed September 7, 1977

Before: Weick, Lively and Engel, Circuit Judges.

Engel, Circuit Judge. Barry William West was employed by United Parcel Service in Nashville, Tennessee. On the day of the alleged offense, West was manning a conveyor belt at the United Parcel Service when he noticed that one of the parcels in shipment had broken open. He removed two guns from the parcel, a Smith and Wesson .38 caliber revolver and a Browning .380 caliber pistol. He then taped the box closed and it continued to its destination, where the consignee, a registered firearms dealer in Santa Fe, Tennessee, reported the loss to special agents of the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury.

On March 17, 1976, an A.T.F. agent questioned West, who readly admitted the foregoing facts. He also retrieved the weapons from his home and delivered them to the government agent. The voluntariness of West's confession is not challenged here and was fully established at the trial. It is undisputed that the guns had been a part of a legitimate commercial shipment from Dalton, Georgia, to the consignee in Santa Fe, Tennessee.

The guns were not stolen at the time they crossed the state line from Georgia into Tennessee and did not recross state lines after the theft.

In a non-jury trial, West was convicted on a one-count grand jury indictment which charged that:

> On or about January 2, 1976, in the Middle District of Tennessee, BARRY WILLIAM WEST knowingly did receive, conceal and store stolen firearms, that is, a Smith and Wesson .38 caliber revolver, Model 60, Serial No. R89979 and a Browning pistol, .380 caliber, Serial No. 70N01435, which were then moving as and were a part of and constituted interstate commerce from Rossville, Georgia, to Santa Fe, Tennessee, knowing and having reasonable cause to believe that the firearms were stolen.
>
> In violation of Title 18, United States Code, Section 922(j).

The court suspended imposition of sentence and placed West on probation for a period of three years.

In his direct appeal, West urges he cannot be convicted under § 922(j) because the weapons were not stolen at the time they were transported from Georgia into Tennessee. He also claims that he cannot be convicted of receiving and storing guns which he himself stole, relying primarily upon *Milanovich v. United States*, 365 U.S. 551 (1961).

The statute cited in the indictment is a part of the Gun Control Act of 1968 and provides:

> It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, or which constitutes, interstate or

foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

West argues forcefully that it is an essential element of the above statute that the weapon be stolen at the time it crosses state lines. As support he relies upon this circuit's construction of similar language in the Dyer Act, 18 U.S.C. §§ 2311-13, (1970). In *United States v. Wages*, 458 F. 2d 1270 (6th Cir 1972), our court reversed a conviction because the government failed to prove that the vehicle in question was stolen at the time it entered Kentucky, alhough it was stolen at the time the defendant received it. Reversing the appellant's conviction on grounds of insufficient evidence, Judge Kent held:

> We find nothing in this record from which the jury could conclude that the transportation (driving) of the tractor from Michigan to Kentucky was done at a time when the tractor had been stolen.
>
> *Wages, supra*, at 1272.

If § 922(j) is similarly construed, the acts set forth in the indictment and proved clearly would not amount to a violation of that section because the guns were not stolen at the time they crossed state lines into Tennessee.

While § 922(j) was included as a part of the Gun Control Act of 1968, it originated as an amendment to the Federal Firearms Act, ch. 850, § 2(g), 52 Stat. 1251 (1938), which at that time provided:

> It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any firearm or ammunition or to pledge or accept as security for a loan any firearm or ammunition moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen, knowing, or having reasonable cause to believe the same to have been stolen.

With certain changes, the offense was more recently incorporated into the Gun Control Act of 1968 and codified at 18 U.S.C. § 922(j).[1]

Although legislative histories of the original and subsequent versions fail to furnish any insight into the problem of statutory construction involved here, one significant alteration in language is evident. Congress has changed the language which describes the requisite nexus to interstate commerce. The law presently covers a stolen firearm "which is moving as, or which is a part of, or which constitutes, interstate or foreign commerce", whereas the earlier statute covered a firearm "moving in or which is a part of interstate or foreign commerce, and which while so moving or constituting such part has been stolen."

While no substantive change is evident on the face of the amendment,[2] we are impressed by the fact that the law as originally enacted in 1938 has been altered and tracks the language of the Dyer Act, § 2313 of which states in part:

> . Whoever, receives, conceals, stores, barters, sells, or disposes of any motor vehicle . . . moving as, or which is a part of, or which constitutes interstate . . . commerce, knowing the same to have been stolen . . .

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[1] For a brief period the prohibition was enacted as part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, 82 Stat. 231, § 922(h) (1968). *See generally* S. Rep. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 2 U.S. Code Cong. & Admin. News, at 2205 (1968).

[2] When the original offense was first revised as part of the Omnibus Crime Control and Safe Streets Act of 1968, *see* note 1 *supra*, the Senate Report simply noted the revised version was "a modified form of the restriction in . . . the . . . Federal Firearms Act . . ." S. Rep. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 2 U.S. Code Cong. & Admin. News, at 2205 (1968). *See also* H. Rep. 1577, 90th Cong., 2d Sess. (1968) *reprinted in* 3 U.S. Code Cong. & Admin. News, at 4421 (1968) (Gun Control Act of 1968).

In nearly identical language the Gun Control Act of 1968 declares it unlawful for any person to "receive, conceal, store, barter, sell or dispose of any stolen firearm . . . which is moving as, or which is a part of, or which constitutes, interstate . . . commerce, knowing or having reasonable cause to believe that the firearm . . . was stolen." We find the fact of change itself and the parallels too close to attribute them to chance.

We recognize, of course, that at the time of the 1968 amendments, the Congress could not have been aware of our interpretation in *Wages, supra*. Nonetheless, absent a compelling reason to the contrary, logic supports the contention that Congress, consciously employing similar language in the two statutes, desired that they be construed in a similar fashion. *See United States v. Ruffin*, 490 F. 2d 557, 561 (8th Cir. 1973).

We recognize also that quite different congressional motives are involved in the enactment of gun control legislation and stolen vehicle legislation. More important to us, however, is the fact that differing statutory constructions would be anomalous where the precise language of the former appears to have been borrowed from the latter.

Our view is further fortified because the offense stated in the indictment is already the subject of federal criminal legislation in 18 U.S.C. § 659 (1970):

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen . . .

Under facts closely analogous to those here, § 659 was applied to convict the defendants in *United States v. Yoppolo*, 435 F. 2d 625 (6th Cir. 1970), upon proof that cases of liquor were stolen in Toledo, Ohio, while in transit from Scotland to Cincinnati. The evidence in *Yoppolo* further established that the goods were not transported across state lines after the theft. It was sufficient, our court held, that the goods were shown to have been moving in commerce because "[a]n interstate or foreign shipment does not lose its characteristics until it arrives at its final destination and is there delivered". *Id.* at 626; *Winer v. United States*, 228 F. 2d 944 (6th Cir.), *cert. denied*, 351 U.S. 905 (1956).[3]

We hold, therefore, that the language of the indictment and the undisputed facts at the trial support a conviction under 18 U.S.C. § 659, but not under § 922(j). The question then remains whether we must reverse the defendant's conviction. For the reasons set forth below, we conclude that the defendant's conviction should be affirmed.

It is apparent here that the language of the indictment returned by the grand jury fully complies with the requirement that it "be a plain, concise and definite written *statement of the essential facts* constituting the offense charged". Fed. R. Crim. P. 7(c)(1) (emphasis added). The indictment serves to notify a defendant of what he is called upon to defend, and its ade-

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[3] While similarities between the Dyer Act and § 659 suggest an inconsistency between *Wages* and *Yoppolo*, the answer, we believe, is that § 659 is a measure clearly directed to protect the channels of commerce among the states. The Dyer Act, by contrast, typifies the use of Congress' power over interstate commerce to reach criminal conduct of a nationwide character which poses no threat to the channels of commerce. The difference justifies the apparently divergent approaches taken by our circuit in *Wages* and *Yoppolo*.

quacy is determined by the statement of the facts which constitute the offense. While 7(c)(1) provides that "[t]he indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated", subsection 3 further indicates that "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice".

In *United States v. Garner*, 529 F. 2d 962 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976), our court upheld a conviction where the defendant was incorrectly charged with conspiracy to violate 18 U.S.C. § 471-73, whereas the specific factual circumstances contained in the indictment and proven at trial made out a conspiracy to violate 18 U.S.C. § 495. We noted that this circuit "has adhered to the principle that if the indictment charges acts that are illegally [sic] under an existing federal statute, then the indictment is not invalidated because it cited the wrong statute." *Id.* at 966, *citing United States v. Perez*, 457 F. 2d 555 (6th Cir. 1972); *Pettway v. United States*, 216 F. 2d 106 (6th Cir. 1954). Under Rule 7, "[t]he fact that an indictment contains a miscitation of a statute is not grounds for dismissing the indictment unless the defendant is misled thereby." *Garner, supra*, 529 F. 2d at 966; *see United States v. Hutcheson*, 312 U.S. 219, 229 (1941).

We are unable to ascertain any possible prejudice to the defendant here from the miscitation of the applicable federal statute. The record fails to suggest that the defendant was disadvantaged or that he would have altered his defense in a way which would have affected the outcome. We find the error in the indictment to be harmless. Fed. R. Crim. P. 7(c)(3).

The statutes involved contain different penalties. The maximum penalty for a violation of 18 U.S.C. § 922(j) is a fine of

not more than $5,000 or imprisonment for not more than five years or both. The penalty for a violation of 18 U.S.C. § 659 is $5,000 fine or imprisonment not to exceed 10 years or both, unless the amount or value involved does not exceed $100, in which case the offense carries a fine of not more than $1,000 or imprisonment of not more than one year or both. Since the proofs did not indicate that the weapons involved had a value of more than $100, we conceive that the maximum penalty for the offense in a conviction under § 659 would be $1,000 or imprisonment for not more than one year.

Since imposition of sentence was suspended and West was placed upon probation, the terms of the judgment need not be disturbed. West is, of course, benefited to the extent that upon any violation of probation, the lesser penalty of § 659 would apply.

Finally, appellant's reliance upon *Milanovich v. United States*, 365 U.S. 551 (1961), is misplaced. Contrary to his assertion, *Milanovich* does not hold that the thief of property may not be convicted for receiving the same property. *Milanovich* simply holds that ordinarily he may not be convicted for the offense of stealing *and* the offense of receiving. The problem of dual punishment is evident in the language of *Milanovich* itself, *id.* at 554-5, and has been recognized as well in our circuit's interpretation of the case. *See Gentry v. United States*, 533 F. 2d 998 (6th Cir. 1976).

Remanded for modification of the judgment to reflect a conviction under 18 U.S.C. § 659 instead of under 18 U.S.C. § 922(j).

United States Court of Appeals
For the Sixth Circuit

No. 77-5031

United States of America, Plaintiff-Appellee,

v.

Barry William West, Defendant-Appellant.

ORDER

(Filed October 6, 1977)

Before: Weick, Lively and Engel, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

Supreme Court, U. S.
FILED
MAR 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-713

In the Supreme Court of the United States

OCTOBER TERM, 1977

BARRY WILLIAM WEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-4 to A-11) is reported at 562 F. 2d 375. The order of the district court (Pet. App. A-1 to A-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1977, and a petition for rehearing with suggestion of rehearing *en banc* was denied on October 6, 1977. The petition for a writ of certiorari was not filed until November 7, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

256-310—78

QUESTIONS PRESENTED

1. Whether the court of appeals' affirmance of petitioner's conviction under 18 U.S.C. 659, rather than under 18 U.S.C. 922(j) as the indictment had charged, violated petitioner's Fifth Amendment right to be indicted by a grand jury.

2. Whether petitioner's conviction for receiving stolen firearms is contrary to the decision in *Milanovich* v. *United States,* 365 U.S. 551.

STATEMENT

Following a non-jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of one count of receiving and storing two firearms shipped in interstate commerce, which he knew or had reasonable cause to believe were stolen, in violation of 18 U.S.C. 922(j).[1] He was sentenced to a probationary term of three years. On appeal the court of appeals held "that the language of the indictment and the undisputed facts at the trial support a conviction under 18 U.S.C. § 659,[2] but not

[1] In pertinent part, 18 U.S.C. 922(j) provides:

> It shall be unlawful for any person to receive, conceal [or] store * * * any stolen firearm * * * which is moving as, which is a part of, or which constitutes, interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

[2] In pertinent part, 18 U.S.C. 659 provides:

> Whoever * * * steals * * * from any motortruck, or other vehicle, or from any * * * storage facility, station, station house, platform or depot * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

under § 922(j)" (Pet App. A–9). Being "unable to ascertain any possible prejudice to the defendant" from what it perceived to be an "error in the indictment" (Pet. App. A–10),[3] the court of appeals affirmed the conviction (Pet. App. A–9), but remanded for modification of the judgment to reflect a misdemeanor conviction under 18 U.S.C. 659 instead of a felony conviction under 18 U.S.C. 922(j) (Pet. App. A–11).

The evidence at trial is not in dispute. It showed that petitioner, while he was working at United Parcel Service in Nashville, Tennessee, stole two firearms from an interstate shipment of weapons en route from Rossville, Georgia, to Santa Fe, Tennessee. Petitioner brought the two firearms to his home in Tennessee and retained possession of them until he

[3] The indictment charged:

> On or about January 2, 1976, in the Middle District of Tennessee, BARRY WILLIAM WEST knowingly did receive, conceal and store stolen firearms, that is, a Smith and Wesson .38 caliber revolver, Model 60, Serial No. R89979 and a Browning pistol, .380 caliber, Serial No. 70N01435, which were then moving as and were a part of the constituted interstate commerce from Rossville, Georgia, to Sante Fe, Tennessee knowing and having reasonable cause to believe that the firearms were stolen.
>
> In violation of Title 18, United States Code, Section 922(j).

surrendered them to an agent of the Bureau of Alcohol, Tobacco and Firearms on March 17, 1976. On that date, petitioner also readily confessed to his commission of the theft (Tr. 9–13, 15).

ARGUMENT

1. Petitioner contends (Pet. 6–8) that the indictment under which he was prosecuted did not charge a violation of 18 U.S.C. 659 and thus that the court of appeals' affirmance of his conviction under that statute violated his Fifth Amendment right to be prosecuted by a grand jury indictment. The question whether the indictment in this case contains a sufficiently complete statement of the facts to charge an offense under 18 U.S.C. 659 raises an interesting theoretical issue.[4] But the Court need not address the question in this case; it is not of such general or recurring importance that it warrants review by the Court, and the court of appeals' disposition of the question, even if incorrect, does no injustice in this case.

[4] There is presently a conflict among the circuits on the question whether an indictment charging an offense under 18 U.S.C. 659 must specify the place from which the goods were stolen (the indictment in this case does not so specify). Compare *United States* v. *Manuszak*, 234 F. 2d 421 (C.A. 3) (holding that the place must be specified), with *United States* v. *Wora*, 246 F. 2d 283 (C.A. 2); *United States* v. *Spivey*, 448 F. 2d 390 (C.A. 4); *Dunson* v. *United States*, 404 F. 2d 447 (C.A. 9), certiorari denied, 393 U.S. 1111 (holding that the place need not be specified). The courts that hold that the place need not be specified in the indictment have, we believe, the better view: " 'Since § 659 enumerated practically all the instruments of interstate commerce, * * * the indictment would naturally be understood as charging that the theft was from one of the enumerated facilities,' [and] accordingly, the failure to specify the facility, did not represent 'a complete omission' of an essential element of the offense * * *" (*United States* v. *Spivey*, *supra*, 448 F. 2d at 391, quoting from *United States* v. *Wora*, *supra*).

a. The undisputed evidence at trial, which includes a stipulation of facts and a confession by petitioner,[5] shows beyond any doubt that petitioner committed an offense under 18 U.S.C. 659. Petitioner does not deny this; indeed, at trial he acknowledged through counsel that "he ha[d] admitted the commission of a criminal offense * * * (Tr. 16). There is no question that this "criminal offense" arises from the same incident for which petitioner was indicted.

Moreover, the indictment and original conviction were for a felony, but petitioner succeeded in the court of appeals in reducing the gravity of his offense to a misdemeanor (because the evidence at trial did not show the value of the firearms to be more than $100 (see Pet. App. A–11; 18 U.S.C. 659)).[6]

Under these circumstances, it is not clear what petitioner hopes to gain by a reversal of his conviction in this Court. If petitioner succeeds, the United States Attorney then would be free to seek a felony

[5] We are lodging copies of the stipulation and the trial transcript with the Clerk of this Court.

[6] Since the offense for which petitioner now stands convicted is a misdemeanor and therefore could have been charged by information instead of by indictment (see Fed. R. Crim. P. 7(a)), it is difficult to see how the court of appeals' decision (even if wrong in its premise that the indictment fairly charged an offense under 18 U.S.C. 659) deprived petitioner of his Fifth Amendment right to indictment by a grand jury.

conviction under 18 U.S.C. 659, and the undisputed evidence in the present case shows that there would likely be little difficulty in succeeding in such a prosecution.[7] Petitioner (who is now on probation for a misdemeanor conviction) thus is not likely to fare better and may fare much worse if his conviction is reversed.

b. Moreover, we believe, contrary to the court of appeals, that petitioner was properly indicted and convicted under 18 U.S.C. 922(j). That statute does not necessarily require "that the weapon be stolen at the time it crosses state lines" (Pet. App. A–6).[8] The only requirement is that the gun "have a contemporaneous connection with commerce at the time of the offense" (*Scarborough* v. *United States,* 431 U.S. 563, 570; cf. *Barrett* v. *United States,* 423 U.S. 212, 217).[9] The issue thus is not whether the gun was stolen before or after crossing state lines but whether "the gun

[7] The record does not reflect the value of the firearms, but we are informed by the United States Attorney's office that the firearms together have a value well in excess of $100 and therefore that petitioner would be prosecutable as a felon under 18 U.S.C. 659.

[8] Such a requirement is contained in 18 U.S.C. 922(i), which makes it unlawful for any person "to transport or ship in interstate or foreign commerce, any stolen firearm * * *." See also 18 U.S.C. 2312 (similar prohibition with respect to stolen vehicles); *United States* v. *Albuquerque*, 538 F. 2d 277, 278 (C.A. 9) (construing 18 U.S.C. 2312); *United States* v. *Johnson*, 526 F. 2d 600, 601 (C.A. 8) (same); *United States* v. *Wyatt*, 437 F. 2d 1168, 1171–1172 (C.A. 7) (same). But 18 U.S.C. 922(i) and 2312 are worded substantially differently from 18 U.S.C. 922(j).

[9] See also 18 U.S.C. 2313 (Dyer Act provision parallel to 18 U.S.C. 922(j)); *United States* v. *Browning*, 439 F. 2d 813, 815 (C.A. 1) ("[I]n a prosecution under 18 U.S.C. 2313 the government must show (1) that the motor vehicle was stolen; (2) that the defendant sold it knowing it was stolen; and (3) that the motor vehicle was moving as or was a part of the interstate commerce at the time it was sold."). Contrary to the court of appeals' view here (Pet. App. A–6 to A–8), 18 U.S.C. 2313 does not invariably require that the vehicle be stolen before it crosses state lines (compare 18 U.S.C. 2312 (see note 8, *supra*)), although ordinarily that is the factual basis upon which a violation of 18 U.S.C. 2313 rests. (This is so because the theft usually is of a vehicle that is not moving in interstate commerce at the time, and consequently a subsequent transportation of it across state lines must be shown to establish the required nexus.) However, the receipt or concealment of (for example) a new automobile stolen from a shipment of automobiles en route from the factory in Michigan to a dealer in Tennessee would be covered by 18 U.S.C. 2313, even if the theft and receipt both occurred in the latter state.

was still moving or was still part of interstate commerce at the time [petitioner] concealed it" (*United States* v. *Ruffin,* 490 F. 2d 557, 561 (C.A. 8)).

The evidence in this case shows such a "contemporaneous connection with commerce." While manning a conveyor belt at the United Parcel Service depot in Nashville, Tennessee, petitioner stole (and at the same time concealed) two firearms that were part of a larger shipment travelling from Georgia to Santa Fe, Tennessee. Although the theft and concealment of the firearms thus occurred in one state, on these facts it is plain that the firearms "[were] still moving [and were] still part of interstate commerce at the time

* * *" (*United States* v. *Ruffin, supra*), within the meaning of 18 U.S.C. 922(j).[10]

2. Petitioner also contends (Pet. 8–9) that under the holding in *Milanovich* v. *United States,* 365 U.S. 551, a person such as himself who is charged with receipt or possession of stolen property cannot be convicted on evidence that he was the thief. But, as the court of appeals correctly pointed out (Pet. App. A–11), *Milanovich* stands only for the proposition that Congress will not be deemed to have authorized convictions and cumulative punishments for both the theft and possession (or receipt) of goods in the absence of a clear indication that that was intended.

[10] Our reading of 18 U.S.C. 922(j) is supported by its legislative history. The predecessor statute of 18 U.S.C. 922(j) (75 Stat. 757; see 52 Stat. 1250, 1251) plainly covered the situation here, *i.e.*, the receipt, concealment, etc. of a firearm "moving in or which is a part of interstate * * * commerce, and which while so moving * * * has been stolen * * *." The amendment of the statute to its present form, moreover, was intended to clarify and (if anything) to broaden, not narrow, its coverage. In explaining the new language the Commissioner of the Internal Revenue Service stated (Hearing on S. 1592, S. 14, S. 1180 and S. 1965 before the Subcommittee to Investigate Juvenile Delinquency of the House Committee on the Judiciary, 89th Cong., 1st Sess. 81 (1965)): "This change will make it clear that the provisions apply to stolen firearms * * * transported in interstate or foreign commerce after having been stolen, as well as to firearms and ammunition stolen in the course of movement in interstate or foreign commerce."

The proposed amendment was enacted into law as Section 922(h) of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 225, 231, and was amended in minor part (including redesignation as Section 922 (j)) by the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213, 1221.

See also *Heflin* v. *United States,* 358 U.S. 415; *Prince* v. *United States,* 352 U.S. 322. The present case does not implicate that rule. Petitioner was tried on a single count charging that he "did receive, conceal and store stolen firearms"; he was not charged with or convicted of the theft itself. Under these circumstances, petitioner's conviction is proper, even though it is based in part on evidence of his participation in the theft. See *United States* v. *Trzcinski,* 553 F. 2d 851 (C.A. 3), certioriari denied, 431 U.S. 919; *Phillips* v. *United States,* 538 F. 2d 586, certiorari denied, 429 U.S. 1024; *United States* v. *Dixon* 507 F. 2d 683 (C.A. 8), certiorari denied, 424 U.S. 976; cf. *Gaddis* v. *United States,* 424 U.S. 544, 550 n. 15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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